UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
&	:	NO. 2698
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
Issued to: JAMES BRUCE HOCKING	:	

This appeal is taken in accordance with 46 U.S.C. § 7701, *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated January 4, 2011, Michael J. Devine, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard, ordered the revocation of the Merchant Mariner License of Mr. James Bruce Hocking (hereinafter "Respondent") upon finding proved one charge of *incompetence*.

The specification found proved alleged that, after Respondent submitted a completed Merchant Mariner Physical Examination Report (Form CG-719K) to the Coast Guard on December 4, 2008, the National Maritime Center (hereinafter "NMC"), on April 2, 2009, informed Respondent that he was not medically fit for merchant mariner duties due to a heart condition and the placement of an Implantable Cardioverter Defibrillator (hereinafter "ICD"). Thereafter, on multiple occasions between May 18, 2009, and May 31, 2009, Respondent served as Master of the M/V NANTUCKET, a Coast Guard-inspected passenger ferry, upon the waters of Nantucket Sound. The specification alleges that by so operating the vessel while not medically fit to do so, Respondent committed an act of *incompetence*.

FACTS

The following facts are taken from the ALJ's Findings of Fact.

At all times relevant herein, Respondent was the holder of the Coast Guard-issued credentials at issue in this proceeding. [D&O at 8]

Every mariner holding a license or endorsement as a first-class pilot is required to have a thorough medical examination each year. [D&O at 9; 46 C.F.R. § 11.709] The results of this medical examination are recorded on a "Merchant Mariner Physical Examination Report" (Form CG 719K). [D&O at 9] On December 4, 2008, Respondent submitted his yearly Form 719K to the Coast Guard. [D&O at 8] On April 2, 2009, via letter, the Coast Guard NMC informed Respondent that he was found to be not medically fit for merchant mariner duties due to the fact that he had a heart condition and an ICD. [D&O at 24; Coast Guard Exhibit (hereinafter "CG Ex.") 3] Respondent nevertheless served as Master of an inspected passenger ferry, the M/V NANTUCKET, on various occasions between May 18, 2009, and May 31, 2009. [D&O at 9, 24]

In March 1995, Respondent suffered an episode of ventricular tachycardia.[1] [D&O at 8; Transcript of the Proceedings (hereinafter "Tr.") at 73-74, 251-52] When ventricular tachycardia occurs, one of the ventricles of the heart beats on its own, whereas normally, electrical impulses travel from the upper chamber of the heart to the lower chamber. [D&O at 8; Tr. at 73] Ventricular tachycardia can occur at any time independent of exertion and presents a risk of sudden cardiac death and incapacitation. [D&O at 8-9; Tr. at 73, 80]

After Respondent's initial episodes of ventricular tachycardia occurred in 1995, it was determined that Respondent suffers from ischemic cardiomyopathy, a weakening of the heart muscles caused by lack of blood flow to the heart muscles. [D&O at 8; Tr. at 59]

[1] He suffered additional episodes of ventricular tachycardia in 1995 and in November of 2000. [Tr. at 72-74, 81] These are not mentioned in the ALJ's Findings of Fact.

The term "ejection fraction" refers to the percentage of the blood volume that is ejected on each stroke or squeeze of the heart relative to the amount of blood that comes into the heart. [D&O at 8; Tr. at 77] A normal ejection fraction is typically in the 55 to 60 percent range. [*Id*.] An ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should. [*Id*.] Respondent's medical records show that his ejection fractions have been measured at 45 percent, 38 percent, 35 percent and 32 percent. [D&O at 8; Tr. at 78, 86-89, Coast Guard Exhibits (hereinafter "CG Ex.") 6, 9]

People with ischemic cardiomyopathy or low ejection fractions are at risk of sudden cardiac death or incapacitation due to ventricular arrhythmias. [D&O at 8; Tr. at 59-60, 88-90, 97-99]

After experiencing ventricular tachycardia in 1995, Respondent had an ICD surgically placed. [D&O at 9; Tr. at 55-63, 254; CG Ex. 1] An ICD is akin to an electrical generator that is designed to detect abnormal rhythms and then provide an electrical shock to correct those rhythms; it is also designed to treat ventricular fibrillation. [D&O at 9; Tr. at 60-62] The placement of an ICD does not eliminate the underlying condition of ischemic cardiomyopathy or the associated risk for a potentially lethal arrhythmia. [D&O at 9; Tr. at 61-63] An ICD has the potential to cause incapacitation because the shock to the heart, if the ICD is in defibrillator mode, can cause an incapacitating event in and of itself. [D&O at 9; Tr. at 61-62] If the ICD fails to "fire," the heart rate could result in incapacitation or even death. [*Id*.] Also, the electrical devices of an ICD may be subject to electrical and magnetic interference by shipboard electrical devices. [D&O at 9; Tr. at 62]

PROCEDURAL HISTORY

On March 23, 2010, the Coast Guard filed a Complaint against Respondent's Coast Guard-issued credentials, alleging that Respondent was physically incompetent and unfit to perform the duties associated with his mariner credentials due to his ICD and underlying cardiac condition. On April 9, 2010, Respondent filed an Answer to the Complaint wherein he admitted all jurisdictional allegations and admitted, in part, and denied, in part, the Complaint's factual

allegations. Respondent denied that he was physically incompetent or unfit for merchant mariner duties.

The hearing in the matter convened on September 23, 2010, in Boston, Massachusetts. [D&O at 6] The Coast Guard was represented by Mr. Gary F. Ball and Investigating Officer Eric A. Bauer, of the Coast Guard Suspension and Revocation National Center of Expertise. [*Id*.] Mr. William Hewig, III, Esq. of Kopelman and Paige, P.C., appeared on behalf of Respondent. [*Id*.] The Coast Guard offered the testimony of one witness during its case-in-chief and fifteen exhibits that were entered into the record. [*Id*.] Respondent offered his own testimony and the testimony of five witnesses and offered forty-one exhibits that were entered into the record. [*Id.*]

The ALJ issued his D&O on January 4, 2011. Respondent filed his Notice of Appeal on January 4, 2011, and perfected his appeal by filing an Appellate Brief on March 4, 2011. The Coast Guard filed a Reply to Respondent's Appellate Brief on April 8, 2011. For its part, the Coast Guard filed a Notice of Appeal on January 31, 2011. The Agency perfected its appeal by filing an Appellate Brief on March 3, 2011. Accordingly, both appeals are properly before me.

BASES OF APPEAL

Both Respondent and the Coast Guard appeal the ALJ's D&O. Respondent raises the following bases of appeal:

I. *The ALJ's conclusion of Law No. 8 and related finding of fact No. 5 are not in accordance with applicable law, precedent, and public policy because they failed to meet the Coast Guard's Burden of Proof, it ignores Commandant Appeal Decision precedents and the plain language of 46 C.F.R. § 5.31, and violates law and public policy by unlawfully enlarging a regulation by judicial fiat;*

II. *The ALJ's conclusion of law Nos. 5 and 8 are not in accordance with applicable law, precedent and public policy because the Commandant's Medical Waiver denial of February 15, 2010, upon which conclusion Nos. 5 and 8 is based, was concluded in violation of the Rehabilitation Act of 1974 and the Due Process provision of the Fifth Amendment of the United States Constitution;*

III. The ALJ's findings of fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are not supported by substantial evidence because they relied on testimony that was uninformed, incomplete, unresponsive, incompetent and based upon a journal article that on its face was irrelevant and did not apply to Captain Hocking's situation; and

IV. Because it relies for support on facts, unsupported by substantial evidence and conclusions of law not in accord with law, precedent and public policy, the ALJ's Decision and Order is an abuse of discretion, arbitrary and capricious.

The Coast Guard simultaneously appeals and raises the following basis of appeal:

> *The ALJ abused his discretion by making the revocation Order applicable to one, but not all, of Respondent's credentials. In so doing the ALJ failed to follow the plain language of 46 C.F.R. § 5.567(b), and the Commandant's clear guidance on the interpretation and application of this regulatory language.*

OPINION

RESPONDENT'S APPEAL

I.

The ALJ's findings of fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are not supported by substantial evidence because they relied on testimony that was uninformed, incomplete, unresponsive, incompetent and based upon a journal article that on its face was irrelevant and did not apply to Captain Hocking's situation

I first address Respondent's third basis of appeal because it attacks the expert testimony that is fundamental to the case. I consider the fourth basis of appeal at the same time, as it is an extension of the third. In summary, Respondent complains that the ALJ's Findings of Fact 8, 11, 12, 14, 16, and 26 and Ultimate Findings and Conclusions 5 and 8 are not supported by substantial evidence, particularly in that the Coast Guard's medical witness based his testimony upon an irrelevant journal article.

The ALJ found, in Finding of Fact number 26, "Based on the underlying heart condition documented in Respondent James Bruce Hocking's medical record, including the 2008 719K there is sufficient information to support the Coast Guard's Finding that Respondent was not fit for duty." [D&O at 9]

The ALJ made other Findings of Fact that Respondent characterizes as Subsidiary.

The ALJ found in Finding of Fact number 8 that the Respondent "has a heart condition diagnosed as ischemic cardiomyopathy, which is a weakening of the heart muscles caused by lack of blood flow to the heart muscles." [D&O at 8] He found in Finding of Fact number 11: "The term 'ejection fraction' refers to 'the percentage of the blood volume that's ejected on each stroke or each squeeze of the heart relative to the amount of blood that comes into the heart'" and that "[a]n ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should." [*Id*.] He found in Finding of Fact number 12: "Normal ejection fraction is typically in the 55 to 60 percent range." [*Id*.] In Finding of Fact number 14, he found: "People with ischemic cardiomyopathy and/or low ejections fractions 'are at a risk of sudden cardiac death due to ventricular arrhythmias'", and in Finding of Fact number 16 that the "danger of ventricular tachycardia is that it 'presents a risk for sudden cardiac death and incapacitation.'" [*Id*.]

Respondent argues in his third basis of appeal that these Findings of Fact are not supported by substantial evidence in the record.

The ALJ found further, as Ultimate Finding of Fact & Conclusion of Law number 5:

> Respondent James Bruce Hocking's Implantable Cardioverter Defibrillator (ICD) and underlying cardiac condition, as documented in the Physical Examination Report submitted on December 4, 2008, render him physically incompetent and unfit for merchant mariner duties associated with his Coast Guard-issued Merchant Mariner's License.

[D&O at 24]

The ALJ found in Ultimate Finding of Fact & Conclusion of Law number 8 that Respondent operated a vessel at diverse times under the authority of his license while medically incompetent. [D&O at 24-25]

I note that the ALJ's Finding of Fact number 26, insofar as it addresses the Coast Guard's finding that Respondent was unfit, is not critical to this case. The Coast Guard's finding that Respondent was not fit for duty set in motion the events culminating in the charge and the proceeding herein, but it is not determinative of the question of whether Respondent committed an act of incompetence so as to be liable to revocation of his license.[2] The balance of Finding of Fact 26 relates directly to Ultimate Finding/Conclusion 5.

The testimony of the Coast Guard's expert, Dr. Hall, was the principal basis for Findings of Fact numbers 8, 11, 12, 14 and 16. [Tr. at 59-60, 73, 77, 88-90] Finding of Fact 8, as it relates to the existence of cardiomyopathy, is documented in an exhibit to whose admission Respondent did not object. [CG Ex. 1] The balance of the finding defines the condition, Finding of Fact 11 defines ejection fraction, and Finding of Fact 12 posits the normal range for the ejection fraction. Nowhere in the record or his brief does Respondent provide support for his summary assertion that these findings are not supported by substantial evidence and he appears to have equally relied on them. I conclude they are supported by substantial evidence. Findings of Fact 14 and 16 relate directly to Ultimate Finding/Conclusion 5 and are discussed below.

The Coast Guard's case turns on Dr. Hall's testimony in which he interprets the significance of the medical data concerning the Respondent and concludes that the risk of sudden cardiac death is substantial.

Dr. Hall was the Chief of the Medical Evaluation Division at the Coast Guard's National Maritime Center in 2009. [Tr. at 40] He is board-certified in occupational medicine. [Tr. at 44] Dr. Hall has "over 20 years of fitness for duty experience ranking from bus and truck drivers, to pilots, air traffic controllers, active duty members, DOD members, and more recently Merchant Mariners." [Tr. at 46] He has five years of experience with merchant mariner medical evaluations. [Tr. at 46] Occupational medical doctors like Dr. Hall "receive specific training and experience in fitness for duty determination examinations and return to work evaluations." [Tr. at 45]

[2] Likewise, if I were to reverse revocation of Respondent's license for insufficient evidence, that action would not determine whether Respondent's license may be renewed when it expires.

The primary concern in a mariner's fitness for duty determination is risk to maritime and public safety. [Tr. at 45]

Assessing risk in this case began with reviewing Respondent's medical condition. Dr. Hall reviewed the factual information described at the beginning of this opinion. He also testified that the medications that Respondent is currently taking (Lipitor, Coreg, Tikosyn and Monopril) were significant to a fitness-for-duty evaluation. [Tr. at 56-58] Tikosyn was of particular concern because "it's used to treat ventricular arrhythmias, and those are serious issues, but the medication can actually cause ventricular arrhythmias, so it has to be used very carefully." [Tr. at 58] In addition to the 1995 instances of ventricular tachycardia, Dr. Hall testified that Respondent's medical records showed that he had an episode of ventricular tachycardia in November of 2000. [Tr. at 81; CG Ex. 7] This event was of concern to the doctor because "it indicates that he is still having ventricular tachycardia." [Tr. at 81] While Respondent's ejection fraction was reported to be 45% in 1995,[3] it declined to 38% according to a report in 2009. [Tr. at 77-78, 84-87; CG Ex. 6, 9] It was reported to have been 32% in 2007. [Tr. at 88-89, CG Ex. 9] In the doctor's words:

> the low ejection fraction in and of itself can cause somebody to have less ability to exert themselves. It can result in shortness of breath; it can result in syncope on exertion. Additionally, when you have ejection fractions in that sort of range, the heart muscle is thick, and it can develop these bad ventricular arrhythmias also resulting in incapacitation or even death.

[Tr. at 89-90]

Dr. Hall concluded that the conditions that Respondent presents are significant and that they pose a risk of sufficient magnitude that they render him not fit for duty. He concluded that Respondent "has an underlying heart condition that in and of itself is disqualifying due to the ejection fraction." [Tr. at 97] Further, the doctor testified: "He's had an episode of ventricular tachycardia which is disqualifying in and of itself and then he has the ICD device which can also be associated with incapacitation which is also disqualifying." [Tr. at 98] Dr. Hall testified that

[3] Dr. Hall's reference to a 45% ejection fraction was based on Exhibit 6 which dates from 1998. Exhibit 6 reflects that the fraction was reported during testing in connection with the implantation of the ICD in 1995.

Respondent's condition places him "at risk for incapacitation and sudden cardiac death even with the ICD." [Tr. at 97] Testifying that an ICD does not reduce the risk for development of a potentially lethal arrhythmia, but rather is just designed to treat them if they arise, Dr. Hall concluded that Respondent "represented a risk to maritime and public safety." [Tr. at 63] An additional concern for him was that the electrical devices of an ICD may be subject to electrical and magnetic interference by shipboard electrical devices. [Tr. at 62] He testified, "[T]his is not a borderline case at all," and "To me this represents a clear risk to maritime public safety due to his current condition." [Tr. at 98]

In looking at the fitness for duty of a person, the nature of the endorsement that the person holds would, Dr. Hall reasoned, factor into a determination as to fitness for duty because "we're worried about risk to maritime and public safety, so a pilot or a master would be of more concern than perhaps somebody who's working on the deck who's not in charge of vessel navigation." [Tr. at 66-67] Dr. Hall further testified that Respondent's present ability to perform the duties associated with his Merchant Mariner Credential would not change his mind as to Respondent's medical fitness. [Tr. at 97] Dr. Hall stated: "His ability to perform his daily functions is one consideration, but he needs to be able to do that without representing a risk to maritime and public safety. He has not been able to show that." [*Id.*] Moreover, Dr. Hall stated that Respondent is a risk because "[h]e's still at risk for incapacitation and sudden cardiac death even with the ICD." [*Id.*]

Respondent challenges Dr. Hall's testimony as *inter alia* incompetent and based upon a journal article that on its face was irrelevant and did not apply to Respondent's situation.

In assessing Respondent's condition, Dr. Hall reviewed NVIC 04-08, "Medical and Physical Evaluation Guidelines for Merchant Mariners," which was promulgated, in part, for public safety reasons in response to the findings of a National Transportation Safety Board investigation into a Staten Island ferry allision that occurred after the assistant captain passed out and became incapacitated. [Tr. at 50, 63-64; D&O at 13-14; *see* *http://www.ntsb.gov/doclib/reports/2005/MAR0501.pdf* at 55] NVIC 04-08 is not a standard or policy but a guideline for evaluation. [Tr. at 158] Dr. Hall testified that in addition to reading

Respondent's physical examination report, which he would have done in five to ten minutes, he conducted additional research for "probably several hours." [Tr. at 108] This research included researching Respondent's medications. [Tr. at 109.] He testified that there "are probably 100 articles" addressing drivers of commercial vehicles with ICDs, and said that at the time of his review of Respondent's record, he believed that he "reviewed some of the papers that were cited in the expert panel" reported in Exhibit 12. [Tr. at 147-149] The source for his opinion concerning potential interference of shipboard electrical devices with the ICD was "extensive review in the literature" and literature presented at a conference in March 2010. [Tr. at 104-105] Dr. Hall testified he would "regularly consult expert panel recommendations," and he responded in the affirmative when asked whether Exhibit 12 would be one of those documents the he would have normally reviewed. [Tr. at 93-94] Exhibit 12 is "Expert Panel Recommendations – Cardiovascular Disease and Commercial Motor Vehicle Driver Safety," Federal Motor Carrier Safety Administration, April 10, 2007.

Respondent asserts: "As a non-cardiologist, Capt. Hall's purported expertise on this subject obviously came in its entirety from the Federal Motor Carrier Safety Administration's [hereinafter "FMCSA"] Expert Panel Recommendations (I.O. Ex. 12), one article." [Respondent's Appellate Brief at 24] He contends Exhibit 12 is intended "to be guidelines for persons with cardiovascular disease." [*Id.* at 25] Dr. Hall testified that cardiovascular disease is "some condition to the coronary arteries causing a lack of blood flow," and conceded that while Respondent has cardiomyopathy, he did not know whether Respondent has cardiovascular disease. [Tr. at 133-134] Accordingly, Respondent contends that "the report is irrelevant to Capt. Hocking's medical condition." [Respondent's Appellate Brief at 38] Respondent ultimately concludes: "The testimony of a non-cardiologist, who based his cardiology opinion on the findings and recommendations of an irrelevant journal article that does not apply to Capt. Hocking's medical condition, is not substantial evidence." [*Id*. at 40] Therefore, Respondent contends that findings of fact based on such opinion must be reversed. [Respondent's Appellate Brief at 40] I do not agree.

Respondent has focused on Exhibit 12, so I will discuss it. Exhibit 12 has two principal parts: recommendations for changes to preexisting FMCSA guidelines concerning the fitness of

commercial vehicle drivers, and appendices that include a "Findings of Evidence Report." Although the scope of some of the experts' observations in Exhibit 12 reaches persons who may not have cardiovascular disease, most of Exhibit 12 does not appear to relate directly to somebody with Respondent's conditions (e.g., while the experts discuss cardiomyopathy in one place, Respondent suffers from another form, according to Dr. Hall. [Tr. at 157]). However, the appendix containing the Findings of Evidence Report responded to questions from FMCSA about risk concerning different issues. In the appendix, Question 4 asked about "the risk of sudden incapacitation or sudden death following implantation of an ICD." [CG Ex. 12 at 25] The experts report that the data in several studies were insufficient to determine whether crashes could be directly attributed to cardiovascular disease or implanted ICDs. Quantitative assessment of available data did suggest that approximately 6.3% of individuals with an ICD will experience an ICD discharge while driving. [CG Ex. 12 at 31] Dr. Hall testified that 6.3% is "huge in the public safety arena," although he acknowledged that a discharge may or may not be debilitating. [Tr. at 141] Notwithstanding the appendix, the principal part of Exhibit 12 – recommended changes to guidelines – recommends retaining the preexisting guideline that flatly precluded *any* individual with an ICD from being certified to drive a commercial motor vehicle. That appears to support Dr. Hall's testimony concerning ICD risk.

At one point in his testimony, when asked whether he would have come to the same conclusion regarding Respondent's fitness, absent NVIC 04-08, Dr. Hall testified, "I would have just used The Federal Motor Carrier expert panel information." [Tr. at 99] The context of the question and the answer was Dr. Hall's initial evaluation of the file. I cannot conclude that Dr. Hall's expert opinion, delivered at the hearing and on which the ALJ relied, was exclusively based on Exhibit 12. Rather, the totality of Dr. Hall's detailed testimony, extending over 127 pages in the record, addressed a wide range of issues and suggests his opinion was based on more than that one exhibit.

While Dr. Hall is board-certified in occupational medicine, he is not a board-certified cardiologist and he did not consult with any cardiologist concerning this case. [Tr. at 101] Nevertheless, the ALJ credited Dr. Hall's expertise, apparently finding Respondent's cross examination inadequate to impeach him. Moreover, Respondent offered no evidence suggesting

that a physician with Dr. Hall's qualifications is incompetent to render an opinion concerning the matters to which he testified. Indeed, Respondent offered no expert medical or scientific testimony concerning this or, for that matter, the medical issues that are at the core of this case.

In Coast Guard Suspension and Revocation cases, the trier of fact is the judge of credibility and determines the weight to be given the evidence. Appeal Decision 2685 (MATT) (citing Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS) and 2017 (TROCHE)). "The Judge's findings of fact will only be altered if determined to have been arbitrary and capricious as a matter of law." Appeal Decision 2018 (GOODWIN).

In this case, after addressing at length the evidence presented through the testimony of Dr. Hall, the ALJ expressly stated: "Upon review of all testimony and evidence contained within the record, the court finds Dr. Hall's testimony concerning Respondent's medical condition to be persuasive." [D&O at 16] The fact that Dr. Hall was not a cardiologist does not impeach his qualifications based on his own medical training and experience. The record shows that the ALJ considered both the fact that Dr. Hall is board-certified in occupational medicine and the exhaustive nature of his testimony in finding that testimony to be credible. I therefore conclude that the record contains substantial evidence to support the ALJ's conclusion that Respondent, due to his current medical situation, poses a risk to maritime safety. The ALJ did not err in finding Dr. Hall's testimony to be both reliable and credible. Contrary to Respondent's assertions, the ALJ's Findings of Fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are supported by substantial evidence in the record.

II.

The ALJ's conclusion of Law No. 8 and related finding of fact No. 5 are not in accordance with applicable law, precedent, and public policy because they failed to meet the Coast Guard's Burden of Proof, it ignores Commandant Appeal Decision precedents and the plain language of 46 C.F.R. § 5.31, and violates law and public policy by unlawfully enlarging a regulation by judicial fiat

Citing Appeal Decision 2547 (PICCIOLO), Respondent contends that in order for a mariner to be found incompetent, he must be shown to be presently incapable of performing the

duties associated with his mariner credential. Respondent argues: "The plain meaning of the words in the Coast Guard's regulatory definition of incompetence, which state: 'incompetence is the inability on the part of a person to perform required duties' does not permit an Investigating Officer or an ALJ to engage in future speculations, nor to rely on a potential debilitating condition." [Respondent's Appellate Brief at 5] Respondent notes, however, that several Commandant Decisions on Appeal carve out "a narrow exception to the rule precluding future speculation, in cases involving claims of disabling mental illness or impairment, or psychiatric disorders." [Respondent's Appellate Brief at 6]

46 C.F.R. § 5.31 defines incompetence as "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof."

In the *Picciolo* case, Mr. Picciolo suffered from diabetes and was found by a Coast Guard ALJ to be physically incompetent to hold a Merchant Mariner Credential due to episodes of high blood sugar, irrespective of the fact that the most recent fitness for duty assessment by a physician had found him fit for duty. Following Mr. Picciolo's appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of whether Mr. Picciolo's blood sugar level could be controlled only through a periodic monitoring program, whether such a program was compatible with available medical services at sea or ashore, whether such a program would unduly interfere with Mr. Picciolo's ability to perform his duties, and the level of risk that Mr. Picciolo would pose to fellow crewmembers and a ship at sea if he failed to follow a prescribed medical program.

The *Picciolo* decision stated that although the ALJ had correctly found the respondent's diabetic condition had been poorly controlled in the past, the medical testimony from his more recent medical care indicated that his condition was then satisfactorily controlled and "it could not be reasonably inferred that he would return to a poorly controlled level should he return to sea."

Contrary to Respondent's argument, the definition of incompetence set forth in 46 C.F.R. § 5.31 does not "speak[] entirely in the present tense," and the *Picciolo* case does not suggest that it does. [Respondent's Appellate Brief at 2] Rather, *Picciolo* supports the proposition that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present.

In the instant case, there is extensive medical testimony on the individual's condition, how it is being treated, and the risks of the condition and treatment, discussed in section I of this opinion. This testimony makes the case similar to Appeal Decision 2664 (SHEA), cited by Respondent. *Shea* concluded that a mental disorder rendered a mariner unfit based on the risk of a future mental breakdown. Respondent claims that *Shea* and other cases "carved out a narrow exception to the rule precluding future speculation" in cases of disabling mental illness or impairment, or psychiatric disorders. [Respondent's Appellate Brief at 6] I reject that characterization; the principle controlling *Shea* is not so narrow.

In the *Shea* case, the respondent suffered from bipolar disorder. He abandoned his watch station and acted in an irrational manner during a ship's voyage. Mr. Shea's actions aboard the vessel eventually led to his being relieved of all duties, being placed in restraints, and being confined in his quarters until the end of the voyage. After subsequently receiving medical treatment, Mr. Shea was declared by his physician to be fit for duty because his mental illness was in remission and his symptoms were being treated with prescription medications. Irrespective of this fit for duty determination, the ALJ found that Mr. Shea was incompetent and ordered the revocation of his Merchant Mariner Credentials.

On appeal, Mr. Shea argued that the ALJ erred in finding him incompetent because the record contained substantial evidence to support a conclusion that his mental condition was medically manageable. The *Shea* decision noted that "[a]lthough the original record did not contain evidence as to the impact that a medical monitoring program would have on the mariner's ability to perform the duties associated with his mariner credential in the *Picciolo* case, such evidence was admitted into the record . . ." in Mr. Shea's case. In *Shea*, the ALJ found that

because Respondent remained at a greater risk than the general population for having breakthrough episodes, even if he was fully compliant in his medical regimen, he could not agree with Mr. Shea's physician as to his fitness for duty. This was because Mr. Shea's physician could not state to a reasonable degree of certainty that Mr. Shea would remain asymptomatic even if he continued taking his medication, because the prescription drug that Mr. Shea was taking had the potential to impair his judgment and motor skills and because Mr. Shea would have to remain asymptomatic for five years before contemplating the cessation of his medications. Because the record contained substantial evidence on the manageability of Mr. Shea's condition supporting the ALJ's conclusion, even though the ALJ reached a different conclusion than Mr. Shea's physician, the ALJ's finding that Mr. Shea was incompetent was upheld.

Mr. Shea further argued that the ALJ abused his discretion by incorrectly basing his finding that Mr. Shea was incompetent on "Respondent's risk of future incompetence, rather than the evidence presented which showed that Respondent was competent and able to safely perform his duties as a ship's engineer at the time of the hearing." *Shea* noted, citing Appeal Decision 2181 (BURKE): "Although Respondent argues the contrary, acknowledging and mitigating the risk of a future mental breakdown stemming from a contemporaneous affliction is not without precedent in these proceedings." In short, *Shea* supports the idea that medical incompetence is not restricted to a determination based on apparent fitness for duty at the present moment. It calls for assessment of the risk of impairment of a mariner's ability to safely carry out duties in the future.

In this case, the ALJ discussed Appeal Decision 2547 (PICCIOLO) and Appeal Decision 2664 (SHEA). The ALJ stated: "Unlike the ALJ's initial decision in PICCIOLO, the ALJ's initial decision issued in SHEA 'considered the testimony, evidence, and arguments presented by Respondent regarding the manageability of his mental condition.'" Thus, the ALJ reasoned, "Appeal Decision 2664 (SHEA) distinguished PICCIOLO, and upheld the ALJ's Order revoking Respondent's credentials despite Respondent's claims that his condition was manageable." [D&O at 12]

Respondent here argues that engaging in speculation as to Respondent's future ability to perform the duties associated with his Merchant Mariner Credentials should not be allowed because such a determination is reserved for cases involving severe psychiatric disorders, as was the case in *Shea*. Nothing in *Shea* limits its scope in that manner, and its reasoning ought to apply with equal force in other circumstances that make out a disability presenting a future risk.

I agree that findings as to fitness for duty should not be based on uninformed speculation. However, the record shows that the ALJ here found Respondent incompetent after carefully considering the evidence contained in the record. In finding the incompetence charge proved the ALJ stated:

> The highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Respondent's license allows him to be in control of the vessel. His medical condition including his implanted ICD places him at greater risk of heart attack or syncope. The Court finds that the Coast Guard has met its burden in regard to presenting sufficient evidence regarding Respondent's medical condition that the risk of incapacitation of Respondent as holder of an MML constitutes medical incompetence and presents a risk to maritime safety.

[D&O at 15-16] (internal citations omitted). I find that the ALJ did not abuse his discretion or act contrary to Commandant Appeal Decision precedent in so finding. There is substantial evidence in the record to show that Respondent's medical condition and his implanted ICD put him at significant risk of an incapacitating incident, to the detriment of maritime safety. The ALJ did not err in relying on the holding in the *Shea* case and considering the future risk presented by Respondent's condition.

While Respondent was not shown to have suffered incapacitation while performing his duties in the past, the risk that he could become so in the future is too great to ignore. Any other holding would be inconsistent with the safety and security of the maritime environment. The ALJ's conclusion that Respondent is medically incompetent is not in error and will not be reversed on this appeal.

III.

The ALJ's conclusion of law Nos. 5 and 8 are not in accordance with applicable law, precedent and public policy because the Commandant's Medical Waiver denial of February 15, 2010, upon which conclusion Nos. 5 and 8 is based, was concluded in violation of the Rehabilitation Act of 1974 and the Due Process provision of the Fifth Amendment of the United States Constitution

Respondent contends in his second basis of appeal that the Coast Guard's handling of his medical waiver request violated the Rehabilitation Act of 1974. Respondent argues that because Respondent is a "person with a disability" under the Rehabilitation Act, he is entitled to "an individualized review, or a case-by-case determination" as to his medical waiver request. [Respondent's Appellate Brief at 15] Respondent contends that such an individualized review did not occur in Respondent's case.

The Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act (hereinafter "ADA"). 29 U.S.C. § 794(d). A court has noted: ". . . the focus of the Rehabilitation Act is upon providing remedies for individuals who are employees. The Rehabilitation Act and Title I of the ADA are interchangeable in many respects. The ADA requires an employee-employer relationship, and the Rehabilitation Act contemplates the same." *Wojewski v. Rapid City Regional Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) (internal citations omitted). Therefore, as the ALJ noted, because "the Coast Guard is not Respondent's employer [and] instead . . . has been designated by Congress to set the standards for licensing merchant mariners to promote safety at sea," Respondent's arguments regarding the application of the Rehabilitation Act are inapposite. [D&O at 20]

Moreover, the Coast Guard's denial of a waiver is not at issue in this case. Although the ALJ discussed the waiver in his D&O, there is ample independent basis in the evidence before him for his finding that Respondent is medically incompetent.

THE COAST GUARD'S APPEAL

The ALJ abused his discretion by making the revocation Order applicable to one, but not all, of Respondent's credentials. In so doing the ALJ failed to follow the plain language of 46 C.F.R. § 5.567(b), and the Commandant's clear guidance on the interpretation and application of this regulatory language.

The Coast Guard argues that the ALJ erred in failing to revoke Respondent's Merchant Mariner Document (MMD). In this case, the ALJ expressly found that insufficient evidence was presented in the record to justify the revocation of Respondent's MMD. The Coast Guard appeals the ALJ's determination on this point and argues that the ALJ did not have discretion to direct the revocation order at only Respondent's Merchant Mariner License. For the reasons discussed below, I disagree.

Concerning orders issued by ALJs, 46 C.F.R. § 5.567(b) provides: "The order is directed against all credentials or endorsements, except that in cases of negligence or professional incompetence, the order is made applicable to specific credentials or endorsements."

As previously stated, 46 C.F.R. § 5.31 defines incompetence as "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof."

The ALJ held that the Coast Guard had not established that Respondent's condition was such as to present an unacceptable risk with regard to duties of positions under an MMD, highlighting evidence to the contrary. [D&O at 23] Most prominently, when asked whether the position held by a person with an ICD was a factor, Dr. Hall responded affirmatively and testified that "a pilot or a master would be of more concern than perhaps somebody who's working on the deck who's not in charge of vessel navigation." [Tr. at 66-67] He later testified that the risk presented by Respondent's condition is "a significant concern for a mariner with a pilot endorsement," apparently allowing for the possibility that it was not a concern for an unlicensed person. [Tr. at 98-99] The ALJ also pointed out that some entry-level unlicensed ratings do not require a medical exam, and the requirement for an annual physical did not apply to holders of an MMD. [D&O at 23]

The issue turns on the meaning of "professional incompetence" in 46 C.F.R. § 5.567(b). Since 46 C.F.R. § 5.31 defines incompetence, it is appropriate to consider it in interpreting 46 C.F.R. § 5.567(b). The Coast Guard's position seems to assume that 46 C.F.R. § 5.31 sets up three separate categories of incompetence: professional, physical, and mental. But the regulation does not use the terms "professional incompetence," "physical incompetence," and "mental incompetence." It refers only to "Incompetence", describing it in terms of "professional deficiencies, physical disability, mental incapacity, or any combination thereof." Accordingly, the term "professional incompetence" in 46 C.F.R§ 5.567(b) is novel and undefined, and I will exercise reasoned judgment in construing it, consistent with 46 C.F.R. § 5.31. I note that physical incompetence might well include both "professional deficiencies" and some kinds of "physical disability" affecting certain professional positions, such as the lack of normal color sense essential to performance as a deck officer. *See* Appeal Decision 2125 (COPLEY). The evidence in this case, explicitly contrasting the level of concern appropriate to a pilot or master with that appropriate to a deck worker, surely calls for a nuanced interpretation of 46 C.F.R. § 5.567(b). Of course, the regulation must be read with an eye to the needs of safety.

In light of the evidence in this case, where there is a lack of evidence that safety would be impaired by Respondent's retention of his MMD, it is consistent with the intent of 46 C.F.R. § 5.567(b) to place Respondent's condition in the category of professional incompetence. The ALJ did not abuse his discretion in declining to order the revocation of Respondent's Merchant Mariner Document.

CONCLUSION

The ALJ's findings and decisions are lawful, based on correct interpretation of the law and supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with the law. The ALJ did not abuse his discretion; his actions were neither arbitrary nor capricious. Accordingly, Respondent's appeal is without merit.

UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
v.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
&	:	NO. 2698
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
Issued to: JAMES BRUCE HOCKING	:	

This appeal is taken in accordance with 46 U.S.C. § 7701, *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated January 4, 2011, Michael J. Devine, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard, ordered the revocation of the Merchant Mariner License of Mr. James Bruce Hocking (hereinafter "Respondent") upon finding proved one charge of *incompetence*.

The specification found proved alleged that, after Respondent submitted a completed Merchant Mariner Physical Examination Report (Form CG-719K) to the Coast Guard on December 4, 2008, the National Maritime Center (hereinafter "NMC"), on April 2, 2009, informed Respondent that he was not medically fit for merchant mariner duties due to a heart condition and the placement of an Implantable Cardioverter Defibrillator (hereinafter "ICD"). Thereafter, on multiple occasions between May 18, 2009, and May 31, 2009, Respondent served as Master of the M/V NANTUCKET, a Coast Guard-inspected passenger ferry, upon the waters of Nantucket Sound. The specification alleges that by so operating the vessel while not medically fit to do so, Respondent committed an act of *incompetence*.

FACTS

The following facts are taken from the ALJ's Findings of Fact.

At all times relevant herein, Respondent was the holder of the Coast Guard-issued credentials at issue in this proceeding. [D&O at 8]

Every mariner holding a license or endorsement as a first-class pilot is required to have a thorough medical examination each year. [D&O at 9; 46 C.F.R. § 11.709] The results of this medical examination are recorded on a "Merchant Mariner Physical Examination Report" (Form CG 719K). [D&O at 9] On December 4, 2008, Respondent submitted his yearly Form 719K to the Coast Guard. [D&O at 8] On April 2, 2009, via letter, the Coast Guard NMC informed Respondent that he was found to be not medically fit for merchant mariner duties due to the fact that he had a heart condition and an ICD. [D&O at 24; Coast Guard Exhibit (hereinafter "CG Ex.") 3] Respondent nevertheless served as Master of an inspected passenger ferry, the M/V NANTUCKET, on various occasions between May 18, 2009, and May 31, 2009. [D&O at 9, 24]

In March 1995, Respondent suffered an episode of ventricular tachycardia.[1] [D&O at 8; Transcript of the Proceedings (hereinafter "Tr.") at 73-74, 251-52] When ventricular tachycardia occurs, one of the ventricles of the heart beats on its own, whereas normally, electrical impulses travel from the upper chamber of the heart to the lower chamber. [D&O at 8; Tr. at 73] Ventricular tachycardia can occur at any time independent of exertion and presents a risk of sudden cardiac death and incapacitation. [D&O at 8-9; Tr. at 73, 80]

After Respondent's initial episodes of ventricular tachycardia occurred in 1995, it was determined that Respondent suffers from ischemic cardiomyopathy, a weakening of the heart muscles caused by lack of blood flow to the heart muscles. [D&O at 8; Tr. at 59]

[1] He suffered additional episodes of ventricular tachycardia in 1995 and in November of 2000. [Tr. at 72-74, 81] These are not mentioned in the ALJ's Findings of Fact.

The term "ejection fraction" refers to the percentage of the blood volume that is ejected on each stroke or squeeze of the heart relative to the amount of blood that comes into the heart. [D&O at 8; Tr. at 77] A normal ejection fraction is typically in the 55 to 60 percent range. [*Id*.] An ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should. [*Id*.] Respondent's medical records show that his ejection fractions have been measured at 45 percent, 38 percent, 35 percent and 32 percent. [D&O at 8; Tr. at 78, 86-89, Coast Guard Exhibits (hereinafter "CG Ex.") 6, 9]

People with ischemic cardiomyopathy or low ejection fractions are at risk of sudden cardiac death or incapacitation due to ventricular arrhythmias. [D&O at 8; Tr. at 59-60, 88-90, 97-99]

After experiencing ventricular tachycardia in 1995, Respondent had an ICD surgically placed. [D&O at 9; Tr. at 55-63, 254; CG Ex. 1] An ICD is akin to an electrical generator that is designed to detect abnormal rhythms and then provide an electrical shock to correct those rhythms; it is also designed to treat ventricular fibrillation. [D&O at 9; Tr. at 60-62] The placement of an ICD does not eliminate the underlying condition of ischemic cardiomyopathy or the associated risk for a potentially lethal arrhythmia. [D&O at 9; Tr. at 61-63] An ICD has the potential to cause incapacitation because the shock to the heart, if the ICD is in defibrillator mode, can cause an incapacitating event in and of itself. [D&O at 9; Tr. at 61-62] If the ICD fails to "fire," the heart rate could result in incapacitation or even death. [*Id*.] Also, the electrical devices of an ICD may be subject to electrical and magnetic interference by shipboard electrical devices. [D&O at 9; Tr. at 62]

PROCEDURAL HISTORY

On March 23, 2010, the Coast Guard filed a Complaint against Respondent's Coast Guard-issued credentials, alleging that Respondent was physically incompetent and unfit to perform the duties associated with his mariner credentials due to his ICD and underlying cardiac condition. On April 9, 2010, Respondent filed an Answer to the Complaint wherein he admitted all jurisdictional allegations and admitted, in part, and denied, in part, the Complaint's factual

allegations. Respondent denied that he was physically incompetent or unfit for merchant mariner duties.

The hearing in the matter convened on September 23, 2010, in Boston, Massachusetts. [D&O at 6] The Coast Guard was represented by Mr. Gary F. Ball and Investigating Officer Eric A. Bauer, of the Coast Guard Suspension and Revocation National Center of Expertise. [*Id*.] Mr. William Hewig, III, Esq. of Kopelman and Paige, P.C., appeared on behalf of Respondent. [*Id*.] The Coast Guard offered the testimony of one witness during its case-in-chief and fifteen exhibits that were entered into the record. [*Id*.] Respondent offered his own testimony and the testimony of five witnesses and offered forty-one exhibits that were entered into the record. [*Id.*]

The ALJ issued his D&O on January 4, 2011. Respondent filed his Notice of Appeal on January 4, 2011, and perfected his appeal by filing an Appellate Brief on March 4, 2011. The Coast Guard filed a Reply to Respondent's Appellate Brief on April 8, 2011. For its part, the Coast Guard filed a Notice of Appeal on January 31, 2011. The Agency perfected its appeal by filing an Appellate Brief on March 3, 2011. Accordingly, both appeals are properly before me.

BASES OF APPEAL

Both Respondent and the Coast Guard appeal the ALJ's D&O. Respondent raises the following bases of appeal:

I. *The ALJ's conclusion of Law No. 8 and related finding of fact No. 5 are not in accordance with applicable law, precedent, and public policy because they failed to meet the Coast Guard's Burden of Proof, it ignores Commandant Appeal Decision precedents and the plain language of 46 C.F.R. § 5.31, and violates law and public policy by unlawfully enlarging a regulation by judicial fiat;*

II. *The ALJ's conclusion of law Nos. 5 and 8 are not in accordance with applicable law, precedent and public policy because the Commandant's Medical Waiver denial of February 15, 2010, upon which conclusion Nos. 5 and 8 is based, was concluded in violation of the Rehabilitation Act of 1974 and the Due Process provision of the Fifth Amendment of the United States Constitution;*

III. The ALJ's findings of fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are not supported by substantial evidence because they relied on testimony that was uninformed, incomplete, unresponsive, incompetent and based upon a journal article that on its face was irrelevant and did not apply to Captain Hocking's situation; and

IV. Because it relies for support on facts, unsupported by substantial evidence and conclusions of law not in accord with law, precedent and public policy, the ALJ's Decision and Order is an abuse of discretion, arbitrary and capricious.

The Coast Guard simultaneously appeals and raises the following basis of appeal:

> *The ALJ abused his discretion by making the revocation Order applicable to one, but not all, of Respondent's credentials. In so doing the ALJ failed to follow the plain language of 46 C.F.R. § 5.567(b), and the Commandant's clear guidance on the interpretation and application of this regulatory language.*

OPINION

RESPONDENT'S APPEAL

I.

The ALJ's findings of fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are not supported by substantial evidence because they relied on testimony that was uninformed, incomplete, unresponsive, incompetent and based upon a journal article that on its face was irrelevant and did not apply to Captain Hocking's situation

I first address Respondent's third basis of appeal because it attacks the expert testimony that is fundamental to the case. I consider the fourth basis of appeal at the same time, as it is an extension of the third. In summary, Respondent complains that the ALJ's Findings of Fact 8, 11, 12, 14, 16, and 26 and Ultimate Findings and Conclusions 5 and 8 are not supported by substantial evidence, particularly in that the Coast Guard's medical witness based his testimony upon an irrelevant journal article.

The ALJ found, in Finding of Fact number 26, "Based on the underlying heart condition documented in Respondent James Bruce Hocking's medical record, including the 2008 719K there is sufficient information to support the Coast Guard's Finding that Respondent was not fit for duty." [D&O at 9]

The ALJ made other Findings of Fact that Respondent characterizes as Subsidiary.

The ALJ found in Finding of Fact number 8 that the Respondent "has a heart condition diagnosed as ischemic cardiomyopathy, which is a weakening of the heart muscles caused by lack of blood flow to the heart muscles." [D&O at 8] He found in Finding of Fact number 11: "The term 'ejection fraction' refers to 'the percentage of the blood volume that's ejected on each stroke or each squeeze of the heart relative to the amount of blood that comes into the heart'" and that "[a]n ejection fraction below the normal range is indicative of a heart that is not pumping as well as it should." [*Id*.] He found in Finding of Fact number 12: "Normal ejection fraction is typically in the 55 to 60 percent range." [*Id*.] In Finding of Fact number 14, he found: "People with ischemic cardiomyopathy and/or low ejections fractions 'are at a risk of sudden cardiac death due to ventricular arrhythmias'", and in Finding of Fact number 16 that the "danger of ventricular tachycardia is that it 'presents a risk for sudden cardiac death and incapacitation.'" [*Id*.]

Respondent argues in his third basis of appeal that these Findings of Fact are not supported by substantial evidence in the record.

The ALJ found further, as Ultimate Finding of Fact & Conclusion of Law number 5:

> Respondent James Bruce Hocking's Implantable Cardioverter Defibrillator (ICD) and underlying cardiac condition, as documented in the Physical Examination Report submitted on December 4, 2008, render him physically incompetent and unfit for merchant mariner duties associated with his Coast Guard-issued Merchant Mariner's License.

[D&O at 24]

The ALJ found in Ultimate Finding of Fact & Conclusion of Law number 8 that Respondent operated a vessel at diverse times under the authority of his license while medically incompetent. [D&O at 24-25]

I note that the ALJ's Finding of Fact number 26, insofar as it addresses the Coast Guard's finding that Respondent was unfit, is not critical to this case. The Coast Guard's finding that Respondent was not fit for duty set in motion the events culminating in the charge and the proceeding herein, but it is not determinative of the question of whether Respondent committed an act of incompetence so as to be liable to revocation of his license.[2] The balance of Finding of Fact 26 relates directly to Ultimate Finding/Conclusion 5.

The testimony of the Coast Guard's expert, Dr. Hall, was the principal basis for Findings of Fact numbers 8, 11, 12, 14 and 16. [Tr. at 59-60, 73, 77, 88-90] Finding of Fact 8, as it relates to the existence of cardiomyopathy, is documented in an exhibit to whose admission Respondent did not object. [CG Ex. 1] The balance of the finding defines the condition, Finding of Fact 11 defines ejection fraction, and Finding of Fact 12 posits the normal range for the ejection fraction. Nowhere in the record or his brief does Respondent provide support for his summary assertion that these findings are not supported by substantial evidence and he appears to have equally relied on them. I conclude they are supported by substantial evidence. Findings of Fact 14 and 16 relate directly to Ultimate Finding/Conclusion 5 and are discussed below.

The Coast Guard's case turns on Dr. Hall's testimony in which he interprets the significance of the medical data concerning the Respondent and concludes that the risk of sudden cardiac death is substantial.

Dr. Hall was the Chief of the Medical Evaluation Division at the Coast Guard's National Maritime Center in 2009. [Tr. at 40] He is board-certified in occupational medicine. [Tr. at 44] Dr. Hall has "over 20 years of fitness for duty experience ranking from bus and truck drivers, to pilots, air traffic controllers, active duty members, DOD members, and more recently Merchant Mariners." [Tr. at 46] He has five years of experience with merchant mariner medical evaluations. [Tr. at 46] Occupational medical doctors like Dr. Hall "receive specific training and experience in fitness for duty determination examinations and return to work evaluations." [Tr. at 45]

[2] Likewise, if I were to reverse revocation of Respondent's license for insufficient evidence, that action would not determine whether Respondent's license may be renewed when it expires.

The primary concern in a mariner's fitness for duty determination is risk to maritime and public safety. [Tr. at 45]

Assessing risk in this case began with reviewing Respondent's medical condition. Dr. Hall reviewed the factual information described at the beginning of this opinion. He also testified that the medications that Respondent is currently taking (Lipitor, Coreg, Tikosyn and Monopril) were significant to a fitness-for-duty evaluation. [Tr. at 56-58] Tikosyn was of particular concern because "it's used to treat ventricular arrhythmias, and those are serious issues, but the medication can actually cause ventricular arrhythmias, so it has to be used very carefully." [Tr. at 58] In addition to the 1995 instances of ventricular tachycardia, Dr. Hall testified that Respondent's medical records showed that he had an episode of ventricular tachycardia in November of 2000. [Tr. at 81; CG Ex. 7] This event was of concern to the doctor because "it indicates that he is still having ventricular tachycardia." [Tr. at 81] While Respondent's ejection fraction was reported to be 45% in 1995,[3] it declined to 38% according to a report in 2009. [Tr. at 77-78, 84-87; CG Ex. 6, 9] It was reported to have been 32% in 2007. [Tr. at 88-89, CG Ex. 9] In the doctor's words:

> the low ejection fraction in and of itself can cause somebody to have less ability to exert themselves. It can result in shortness of breath; it can result in syncope on exertion. Additionally, when you have ejection fractions in that sort of range, the heart muscle is thick, and it can develop these bad ventricular arrhythmias also resulting in incapacitation or even death.

[Tr. at 89-90]

Dr. Hall concluded that the conditions that Respondent presents are significant and that they pose a risk of sufficient magnitude that they render him not fit for duty. He concluded that Respondent "has an underlying heart condition that in and of itself is disqualifying due to the ejection fraction." [Tr. at 97] Further, the doctor testified: "He's had an episode of ventricular tachycardia which is disqualifying in and of itself and then he has the ICD device which can also be associated with incapacitation which is also disqualifying." [Tr. at 98] Dr. Hall testified that

[3] Dr. Hall's reference to a 45% ejection fraction was based on Exhibit 6 which dates from 1998. Exhibit 6 reflects that the fraction was reported during testing in connection with the implantation of the ICD in 1995.

Respondent's condition places him "at risk for incapacitation and sudden cardiac death even with the ICD." [Tr. at 97] Testifying that an ICD does not reduce the risk for development of a potentially lethal arrhythmia, but rather is just designed to treat them if they arise, Dr. Hall concluded that Respondent "represented a risk to maritime and public safety." [Tr. at 63] An additional concern for him was that the electrical devices of an ICD may be subject to electrical and magnetic interference by shipboard electrical devices. [Tr. at 62] He testified, "[T]his is not a borderline case at all," and "To me this represents a clear risk to maritime public safety due to his current condition." [Tr. at 98]

In looking at the fitness for duty of a person, the nature of the endorsement that the person holds would, Dr. Hall reasoned, factor into a determination as to fitness for duty because "we're worried about risk to maritime and public safety, so a pilot or a master would be of more concern than perhaps somebody who's working on the deck who's not in charge of vessel navigation." [Tr. at 66-67] Dr. Hall further testified that Respondent's present ability to perform the duties associated with his Merchant Mariner Credential would not change his mind as to Respondent's medical fitness. [Tr. at 97] Dr. Hall stated: "His ability to perform his daily functions is one consideration, but he needs to be able to do that without representing a risk to maritime and public safety. He has not been able to show that." [*Id.*] Moreover, Dr. Hall stated that Respondent is a risk because "[h]e's still at risk for incapacitation and sudden cardiac death even with the ICD." [*Id.*]

Respondent challenges Dr. Hall's testimony as *inter alia* incompetent and based upon a journal article that on its face was irrelevant and did not apply to Respondent's situation.

In assessing Respondent's condition, Dr. Hall reviewed NVIC 04-08, "Medical and Physical Evaluation Guidelines for Merchant Mariners," which was promulgated, in part, for public safety reasons in response to the findings of a National Transportation Safety Board investigation into a Staten Island ferry allision that occurred after the assistant captain passed out and became incapacitated. [Tr. at 50, 63-64; D&O at 13-14; *see* *http://www.ntsb.gov/doclib/reports/2005/MAR0501.pdf* at 55] NVIC 04-08 is not a standard or policy but a guideline for evaluation. [Tr. at 158] Dr. Hall testified that in addition to reading

Respondent's physical examination report, which he would have done in five to ten minutes, he conducted additional research for "probably several hours." [Tr. at 108] This research included researching Respondent's medications. [Tr. at 109.] He testified that there "are probably 100 articles" addressing drivers of commercial vehicles with ICDs, and said that at the time of his review of Respondent's record, he believed that he "reviewed some of the papers that were cited in the expert panel" reported in Exhibit 12. [Tr. at 147-149] The source for his opinion concerning potential interference of shipboard electrical devices with the ICD was "extensive review in the literature" and literature presented at a conference in March 2010. [Tr. at 104-105] Dr. Hall testified he would "regularly consult expert panel recommendations," and he responded in the affirmative when asked whether Exhibit 12 would be one of those documents the he would have normally reviewed. [Tr. at 93-94] Exhibit 12 is "Expert Panel Recommendations – Cardiovascular Disease and Commercial Motor Vehicle Driver Safety," Federal Motor Carrier Safety Administration, April 10, 2007.

Respondent asserts: "As a non-cardiologist, Capt. Hall's purported expertise on this subject obviously came in its entirety from the Federal Motor Carrier Safety Administration's [hereinafter "FMCSA"] Expert Panel Recommendations (I.O. Ex. 12), one article." [Respondent's Appellate Brief at 24] He contends Exhibit 12 is intended "to be guidelines for persons with cardiovascular disease." [*Id.* at 25] Dr. Hall testified that cardiovascular disease is "some condition to the coronary arteries causing a lack of blood flow," and conceded that while Respondent has cardiomyopathy, he did not know whether Respondent has cardiovascular disease. [Tr. at 133-134] Accordingly, Respondent contends that "the report is irrelevant to Capt. Hocking's medical condition." [Respondent's Appellate Brief at 38] Respondent ultimately concludes: "The testimony of a non-cardiologist, who based his cardiology opinion on the findings and recommendations of an irrelevant journal article that does not apply to Capt. Hocking's medical condition, is not substantial evidence." [*Id*. at 40] Therefore, Respondent contends that findings of fact based on such opinion must be reversed. [Respondent's Appellate Brief at 40] I do not agree.

Respondent has focused on Exhibit 12, so I will discuss it. Exhibit 12 has two principal parts: recommendations for changes to preexisting FMCSA guidelines concerning the fitness of

commercial vehicle drivers, and appendices that include a "Findings of Evidence Report." Although the scope of some of the experts' observations in Exhibit 12 reaches persons who may not have cardiovascular disease, most of Exhibit 12 does not appear to relate directly to somebody with Respondent's conditions (e.g., while the experts discuss cardiomyopathy in one place, Respondent suffers from another form, according to Dr. Hall. [Tr. at 157]). However, the appendix containing the Findings of Evidence Report responded to questions from FMCSA about risk concerning different issues. In the appendix, Question 4 asked about "the risk of sudden incapacitation or sudden death following implantation of an ICD." [CG Ex. 12 at 25] The experts report that the data in several studies were insufficient to determine whether crashes could be directly attributed to cardiovascular disease or implanted ICDs. Quantitative assessment of available data did suggest that approximately 6.3% of individuals with an ICD will experience an ICD discharge while driving. [CG Ex. 12 at 31] Dr. Hall testified that 6.3% is "huge in the public safety arena," although he acknowledged that a discharge may or may not be debilitating. [Tr. at 141] Notwithstanding the appendix, the principal part of Exhibit 12 – recommended changes to guidelines – recommends retaining the preexisting guideline that flatly precluded *any* individual with an ICD from being certified to drive a commercial motor vehicle. That appears to support Dr. Hall's testimony concerning ICD risk.

At one point in his testimony, when asked whether he would have come to the same conclusion regarding Respondent's fitness, absent NVIC 04-08, Dr. Hall testified, "I would have just used The Federal Motor Carrier expert panel information." [Tr. at 99] The context of the question and the answer was Dr. Hall's initial evaluation of the file. I cannot conclude that Dr. Hall's expert opinion, delivered at the hearing and on which the ALJ relied, was exclusively based on Exhibit 12. Rather, the totality of Dr. Hall's detailed testimony, extending over 127 pages in the record, addressed a wide range of issues and suggests his opinion was based on more than that one exhibit.

While Dr. Hall is board-certified in occupational medicine, he is not a board-certified cardiologist and he did not consult with any cardiologist concerning this case. [Tr. at 101] Nevertheless, the ALJ credited Dr. Hall's expertise, apparently finding Respondent's cross examination inadequate to impeach him. Moreover, Respondent offered no evidence suggesting

that a physician with Dr. Hall's qualifications is incompetent to render an opinion concerning the matters to which he testified. Indeed, Respondent offered no expert medical or scientific testimony concerning this or, for that matter, the medical issues that are at the core of this case.

In Coast Guard Suspension and Revocation cases, the trier of fact is the judge of credibility and determines the weight to be given the evidence. Appeal Decision 2685 (MATT) (citing Appeal Decisions 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS) and 2017 (TROCHE)). "The Judge's findings of fact will only be altered if determined to have been arbitrary and capricious as a matter of law." Appeal Decision 2018 (GOODWIN).

In this case, after addressing at length the evidence presented through the testimony of Dr. Hall, the ALJ expressly stated: "Upon review of all testimony and evidence contained within the record, the court finds Dr. Hall's testimony concerning Respondent's medical condition to be persuasive." [D&O at 16] The fact that Dr. Hall was not a cardiologist does not impeach his qualifications based on his own medical training and experience. The record shows that the ALJ considered both the fact that Dr. Hall is board-certified in occupational medicine and the exhaustive nature of his testimony in finding that testimony to be credible. I therefore conclude that the record contains substantial evidence to support the ALJ's conclusion that Respondent, due to his current medical situation, poses a risk to maritime safety. The ALJ did not err in finding Dr. Hall's testimony to be both reliable and credible. Contrary to Respondent's assertions, the ALJ's Findings of Fact no. 26 and subsidiary findings Nos. 8, 11, 12, 14, and 16 are supported by substantial evidence in the record.

II.

The ALJ's conclusion of Law No. 8 and related finding of fact No. 5 are not in accordance with applicable law, precedent, and public policy because they failed to meet the Coast Guard's Burden of Proof, it ignores Commandant Appeal Decision precedents and the plain language of 46 C.F.R. § 5.31, and violates law and public policy by unlawfully enlarging a regulation by judicial fiat

Citing Appeal Decision 2547 (PICCIOLO), Respondent contends that in order for a mariner to be found incompetent, he must be shown to be presently incapable of performing the

duties associated with his mariner credential. Respondent argues: "The plain meaning of the words in the Coast Guard's regulatory definition of incompetence, which state: 'incompetence is the inability on the part of a person to perform required duties' does not permit an Investigating Officer or an ALJ to engage in future speculations, nor to rely on a potential debilitating condition." [Respondent's Appellate Brief at 5] Respondent notes, however, that several Commandant Decisions on Appeal carve out "a narrow exception to the rule precluding future speculation, in cases involving claims of disabling mental illness or impairment, or psychiatric disorders." [Respondent's Appellate Brief at 6]

46 C.F.R. § 5.31 defines incompetence as "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof."

In the *Picciolo* case, Mr. Picciolo suffered from diabetes and was found by a Coast Guard ALJ to be physically incompetent to hold a Merchant Mariner Credential due to episodes of high blood sugar, irrespective of the fact that the most recent fitness for duty assessment by a physician had found him fit for duty. Following Mr. Picciolo's appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of whether Mr. Picciolo's blood sugar level could be controlled only through a periodic monitoring program, whether such a program was compatible with available medical services at sea or ashore, whether such a program would unduly interfere with Mr. Picciolo's ability to perform his duties, and the level of risk that Mr. Picciolo would pose to fellow crewmembers and a ship at sea if he failed to follow a prescribed medical program.

The *Picciolo* decision stated that although the ALJ had correctly found the respondent's diabetic condition had been poorly controlled in the past, the medical testimony from his more recent medical care indicated that his condition was then satisfactorily controlled and "it could not be reasonably inferred that he would return to a poorly controlled level should he return to sea."

Contrary to Respondent's argument, the definition of incompetence set forth in 46 C.F.R. § 5.31 does not "speak[] entirely in the present tense," and the *Picciolo* case does not suggest that it does. [Respondent's Appellate Brief at 2] Rather, *Picciolo* supports the proposition that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present.

In the instant case, there is extensive medical testimony on the individual's condition, how it is being treated, and the risks of the condition and treatment, discussed in section I of this opinion. This testimony makes the case similar to Appeal Decision 2664 (SHEA), cited by Respondent. *Shea* concluded that a mental disorder rendered a mariner unfit based on the risk of a future mental breakdown. Respondent claims that *Shea* and other cases "carved out a narrow exception to the rule precluding future speculation" in cases of disabling mental illness or impairment, or psychiatric disorders. [Respondent's Appellate Brief at 6] I reject that characterization; the principle controlling *Shea* is not so narrow.

In the *Shea* case, the respondent suffered from bipolar disorder. He abandoned his watch station and acted in an irrational manner during a ship's voyage. Mr. Shea's actions aboard the vessel eventually led to his being relieved of all duties, being placed in restraints, and being confined in his quarters until the end of the voyage. After subsequently receiving medical treatment, Mr. Shea was declared by his physician to be fit for duty because his mental illness was in remission and his symptoms were being treated with prescription medications. Irrespective of this fit for duty determination, the ALJ found that Mr. Shea was incompetent and ordered the revocation of his Merchant Mariner Credentials.

On appeal, Mr. Shea argued that the ALJ erred in finding him incompetent because the record contained substantial evidence to support a conclusion that his mental condition was medically manageable. The *Shea* decision noted that "[a]lthough the original record did not contain evidence as to the impact that a medical monitoring program would have on the mariner's ability to perform the duties associated with his mariner credential in the *Picciolo* case, such evidence was admitted into the record . . ." in Mr. Shea's case. In *Shea*, the ALJ found that

because Respondent remained at a greater risk than the general population for having breakthrough episodes, even if he was fully compliant in his medical regimen, he could not agree with Mr. Shea's physician as to his fitness for duty. This was because Mr. Shea's physician could not state to a reasonable degree of certainty that Mr. Shea would remain asymptomatic even if he continued taking his medication, because the prescription drug that Mr. Shea was taking had the potential to impair his judgment and motor skills and because Mr. Shea would have to remain asymptomatic for five years before contemplating the cessation of his medications. Because the record contained substantial evidence on the manageability of Mr. Shea's condition supporting the ALJ's conclusion, even though the ALJ reached a different conclusion than Mr. Shea's physician, the ALJ's finding that Mr. Shea was incompetent was upheld.

Mr. Shea further argued that the ALJ abused his discretion by incorrectly basing his finding that Mr. Shea was incompetent on "Respondent's risk of future incompetence, rather than the evidence presented which showed that Respondent was competent and able to safely perform his duties as a ship's engineer at the time of the hearing." *Shea* noted, citing Appeal Decision 2181 (BURKE): "Although Respondent argues the contrary, acknowledging and mitigating the risk of a future mental breakdown stemming from a contemporaneous affliction is not without precedent in these proceedings." In short, *Shea* supports the idea that medical incompetence is not restricted to a determination based on apparent fitness for duty at the present moment. It calls for assessment of the risk of impairment of a mariner's ability to safely carry out duties in the future.

In this case, the ALJ discussed Appeal Decision 2547 (PICCIOLO) and Appeal Decision 2664 (SHEA). The ALJ stated: "Unlike the ALJ's initial decision in PICCIOLO, the ALJ's initial decision issued in SHEA 'considered the testimony, evidence, and arguments presented by Respondent regarding the manageability of his mental condition.'" Thus, the ALJ reasoned, "Appeal Decision 2664 (SHEA) distinguished PICCIOLO, and upheld the ALJ's Order revoking Respondent's credentials despite Respondent's claims that his condition was manageable." [D&O at 12]

Respondent here argues that engaging in speculation as to Respondent's future ability to perform the duties associated with his Merchant Mariner Credentials should not be allowed because such a determination is reserved for cases involving severe psychiatric disorders, as was the case in *Shea*. Nothing in *Shea* limits its scope in that manner, and its reasoning ought to apply with equal force in other circumstances that make out a disability presenting a future risk.

I agree that findings as to fitness for duty should not be based on uninformed speculation. However, the record shows that the ALJ here found Respondent incompetent after carefully considering the evidence contained in the record. In finding the incompetence charge proved the ALJ stated:

> The highest standard of care is placed on vessel officers for the personal safety of passengers and crew. Respondent's license allows him to be in control of the vessel. His medical condition including his implanted ICD places him at greater risk of heart attack or syncope. The Court finds that the Coast Guard has met its burden in regard to presenting sufficient evidence regarding Respondent's medical condition that the risk of incapacitation of Respondent as holder of an MML constitutes medical incompetence and presents a risk to maritime safety.

[D&O at 15-16] (internal citations omitted). I find that the ALJ did not abuse his discretion or act contrary to Commandant Appeal Decision precedent in so finding. There is substantial evidence in the record to show that Respondent's medical condition and his implanted ICD put him at significant risk of an incapacitating incident, to the detriment of maritime safety. The ALJ did not err in relying on the holding in the *Shea* case and considering the future risk presented by Respondent's condition.

While Respondent was not shown to have suffered incapacitation while performing his duties in the past, the risk that he could become so in the future is too great to ignore. Any other holding would be inconsistent with the safety and security of the maritime environment. The ALJ's conclusion that Respondent is medically incompetent is not in error and will not be reversed on this appeal.

III.

The ALJ's conclusion of law Nos. 5 and 8 are not in accordance with applicable law, precedent and public policy because the Commandant's Medical Waiver denial of February 15, 2010, upon which conclusion Nos. 5 and 8 is based, was concluded in violation of the Rehabilitation Act of 1974 and the Due Process provision of the Fifth Amendment of the United States Constitution

Respondent contends in his second basis of appeal that the Coast Guard's handling of his medical waiver request violated the Rehabilitation Act of 1974. Respondent argues that because Respondent is a "person with a disability" under the Rehabilitation Act, he is entitled to "an individualized review, or a case-by-case determination" as to his medical waiver request. [Respondent's Appellate Brief at 15] Respondent contends that such an individualized review did not occur in Respondent's case.

The Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. The standards for determining employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act (hereinafter "ADA"). 29 U.S.C. § 794(d). A court has noted: ". . . the focus of the Rehabilitation Act is upon providing remedies for individuals who are employees. The Rehabilitation Act and Title I of the ADA are interchangeable in many respects. The ADA requires an employee-employer relationship, and the Rehabilitation Act contemplates the same." *Wojewski v. Rapid City Regional Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) (internal citations omitted). Therefore, as the ALJ noted, because "the Coast Guard is not Respondent's employer [and] instead . . . has been designated by Congress to set the standards for licensing merchant mariners to promote safety at sea," Respondent's arguments regarding the application of the Rehabilitation Act are inapposite. [D&O at 20]

Moreover, the Coast Guard's denial of a waiver is not at issue in this case. Although the ALJ discussed the waiver in his D&O, there is ample independent basis in the evidence before him for his finding that Respondent is medically incompetent.

THE COAST GUARD'S APPEAL

The ALJ abused his discretion by making the revocation Order applicable to one, but not all, of Respondent's credentials. In so doing the ALJ failed to follow the plain language of 46 C.F.R. § 5.567(b), and the Commandant's clear guidance on the interpretation and application of this regulatory language.

The Coast Guard argues that the ALJ erred in failing to revoke Respondent's Merchant Mariner Document (MMD). In this case, the ALJ expressly found that insufficient evidence was presented in the record to justify the revocation of Respondent's MMD. The Coast Guard appeals the ALJ's determination on this point and argues that the ALJ did not have discretion to direct the revocation order at only Respondent's Merchant Mariner License. For the reasons discussed below, I disagree.

Concerning orders issued by ALJs, 46 C.F.R. § 5.567(b) provides: "The order is directed against all credentials or endorsements, except that in cases of negligence or professional incompetence, the order is made applicable to specific credentials or endorsements."

As previously stated, 46 C.F.R. § 5.31 defines incompetence as "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof."

The ALJ held that the Coast Guard had not established that Respondent's condition was such as to present an unacceptable risk with regard to duties of positions under an MMD, highlighting evidence to the contrary. [D&O at 23] Most prominently, when asked whether the position held by a person with an ICD was a factor, Dr. Hall responded affirmatively and testified that "a pilot or a master would be of more concern than perhaps somebody who's working on the deck who's not in charge of vessel navigation." [Tr. at 66-67] He later testified that the risk presented by Respondent's condition is "a significant concern for a mariner with a pilot endorsement," apparently allowing for the possibility that it was not a concern for an unlicensed person. [Tr. at 98-99] The ALJ also pointed out that some entry-level unlicensed ratings do not require a medical exam, and the requirement for an annual physical did not apply to holders of an MMD. [D&O at 23]

The issue turns on the meaning of "professional incompetence" in 46 C.F.R. § 5.567(b). Since 46 C.F.R. § 5.31 defines incompetence, it is appropriate to consider it in interpreting 46 C.F.R. § 5.567(b). The Coast Guard's position seems to assume that 46 C.F.R. § 5.31 sets up three separate categories of incompetence: professional, physical, and mental. But the regulation does not use the terms "professional incompetence," "physical incompetence," and "mental incompetence." It refers only to "Incompetence", describing it in terms of "professional deficiencies, physical disability, mental incapacity, or any combination thereof." Accordingly, the term "professional incompetence" in 46 C.F.R§ 5.567(b) is novel and undefined, and I will exercise reasoned judgment in construing it, consistent with 46 C.F.R. § 5.31. I note that physical incompetence might well include both "professional deficiencies" and some kinds of "physical disability" affecting certain professional positions, such as the lack of normal color sense essential to performance as a deck officer. *See* Appeal Decision 2125 (COPLEY). The evidence in this case, explicitly contrasting the level of concern appropriate to a pilot or master with that appropriate to a deck worker, surely calls for a nuanced interpretation of 46 C.F.R. § 5.567(b). Of course, the regulation must be read with an eye to the needs of safety.

In light of the evidence in this case, where there is a lack of evidence that safety would be impaired by Respondent's retention of his MMD, it is consistent with the intent of 46 C.F.R. § 5.567(b) to place Respondent's condition in the category of professional incompetence. The ALJ did not abuse his discretion in declining to order the revocation of Respondent's Merchant Mariner Document.

CONCLUSION

The ALJ's findings and decisions are lawful, based on correct interpretation of the law and supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with the law. The ALJ did not abuse his discretion; his actions were neither arbitrary nor capricious. Accordingly, Respondent's appeal is without merit.

Ally Brice-O'Hara

ORDER

The ALJ's Order, dated January 4, 2011, is AFFIRMED.

VADM, Vice Commandant

Signed at Washington, D.C. this 25th day of April, 2012.